IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 992 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MANUJI MAGANJI THAKORE

Versus

STATE OF GUJARAT

Appearance:

MR MJ BUDDHBHATTI for Appellants

MR AJ DESAI, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 25/02/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. This Appeal is preferred by both the accused of Sessions Case No. 198 of 1994 against judgment and order dated 31.8.1995 passed by the learned Additional Sessions Judge, Ahmedabad, Court No.7, convicting both the appellants for the charges levelled against them under Section 302 read with Section 34 of the IPC and punishing each of the appellant for the life imprisonment. Learned Additional Sessions Judge acquitted both the appellants for the charges levelled against them under Section 498-A of the IPC with the observations that the prosecution failed to prove such charges against accused appellants.

2. As per the prosecution case, the incident occurred on 9.2.1994 and the victim of the incident Kamlaben was married to appellant - accused No.1 Manuji Maganji Thakore before nine months of the incident. After the marriage, appellant accused No.1, appellant accused No.2, mother-in-law of the deceased and father-in-law as well as elder brother and wife of elder brother of appellant - accused No.1 were residing together at Ahmedabad near Prem Darwaja in Amuldas Chali. According to the prosecution case, parental home of the deceased was at New Cloth Market, Ahmedabad. Her father had expired and mother Gangaben was alive. Appellant accused No.1 husband of deceased Kamlaben was doing labour work by transporting goods through hand-cart. On the day of the incident at about 11.30 a.m., appellant accused No.1 came to the house, and at that time deceased Kamlaben requested her husband that why her husband was harassing her for whole night every day for sexual gratification. On her request, appellant accused No.1 got excited and he slapped deceased Kamlaben and gave abuses. Kamlaben resisted this action of appellant accused No.1. Thereafter, appellant - accused No.1 directed Kamlaben to prepare tea but deceased Kamlaben prepared tea for herself only, and when she was preparing tea, appellant - accused No.1 fetched a can of kerosene from anteroom and poured on her. At that time, appellant accused No.2 Paruben, mother-in-law of the deceased ignited match upon deceased from behind. Thereafter, she was in flames and came out of the house and was fallen down. The persons residing nearby were gathered, but both the appellants had ran away from the house. Appellant - accused No.2 Paruben came after some time, and in ambulance at about 3.00 p.m. she was shifted to Civil Hospital, Ahmedabad, where she was treated by PW-7 Dr.Belaben Amitkumar Patel, but during treatment, Kamlaben died on 11.2.1994. While deceased was taken to Civil Hospital at Ahmedabad, from the information received from PW-7 Dr. Belaben Amitkumar Patel, Head Constable on duty at Hospital informed Madhavpura Police

Station vide Vardhi Exh. 21, and in turn at 6.00 p.m. PW-5 Bharatkumar Shankerdutt Shukla, second PI of Madhavpura Police Station, reached Civil Hospital where he recorded the complaint of deceased Kamlaben. Thereafter, the said complaint was registered before Madhavpura Police Station as I-CR No. 55/1994. The complaint is produced at Exh. 22 which is recorded on 19.15 hours on 9.2.1994 by PW-5 Bharatkumar Shankerdutt Shukla. On registering the offence, the investigation was entrusted to PW-6 Chandrakant Lalluram Vora, who draw the panchnama of scene of offence and made arrangements to record the Dying Declaration of the deceased through Executive Magistrate and Executive Magistrate on receiving Yadi, recorded Dying Declaration of the deceased in the Hospital at 21.20 hours. Executive Magistrate Baldevabhai Rambhai Patel is examined as PW-2 at Exh. 13. After investigation, a charge sheet was filed against both the appellants, and in turn, the case was committed to the Court of Sessions.

3. A charge vide Exh.3 was framed by learned Additional Sessions Judge on 24.10.1994 against both the appellants - accused for the offenses punishable under Section 302 and 498-A read with Section 34 of the IPC. On pleading not guilty, prosecution examined as many as seven witnesses and produced documentary evidence on record. While after the evidence of prosecution was over, the accused - appellants examined three defence witnesses at Exh. 40 Yogesh Niranjanbhai, Exh. 42 Mahesh Damodarbhai and Exh. 43 Somaji Mohanji, and in their defense, accused appellants stated that they were staying in joint family and no mental as well as physical cruelty ever was executed on deceased Kamlaben by any of the family members of the accused. Denying the charges it was stated that accused - appellant No.1 Manuji Maganji was not present at the time of the incident and was doing his labour work on hand-cart. At that time, as per appellant - accused No.1 while he was with Lalji Mulji Transport Company, and according to their instruction, he loaded his hand-cart with cartons of medicines and had been to Ashram Road for delivery of said goods to one C.M. Agency. While returning after delivering the parcels to C.M. Agency and obtaining signature of C.M. Agency for having received the goods, when he was going again to Lalji Mulji Transport Company, he came to know that her wife had burnt and was admitted to Civil Hospital. While according to accused appellant No.2 Paruben, she had been to Sabarmati because her relative Mangaji Mohanji had expired on the same day and therefore appellant - accused No.2 and father of appellant - accused No.1 both had been to attend the

funeral and other rituals on the death of their relative Mangaji Mohanji at Sabarmati and when appellant - accused No.2 returned to house, she came to know that Kamlaben had burnt and thereafter mother of the deceased was called and appellant - accused No.2 along with Gangaben, mother of the deceased, the deceased Kamlaben was taken to Civil Hospital.

4. After considering the evidence of prosecution and the defence of the accused and hearing both the sides, learned Additional Sessions Judge came to the conclusion that the appellant - accused No.1 was liable to be punished under Section 302 of the IPC while appellant accused No.2 was liable to be punished for the charges proved against her under Section 302 read with Section 34 of the IPC and hence both the appellants - accused were sentenced to life imprisonment as above said. Being aggrieved and dissatisfied with the above said judgment and order, this Appeal is preferred by the original accused of the aforesaid Sessions Case.

5. Learned Advocate Mr. M.J. Buddhbhatti for the appellants and learned APP Mr. A.J. Desai for the respondent - State were heard at length.

6. To prove its case, the prosecution examined seven witnesses and the defence examined three witnesses to prove that none of the accused - appellants were present at the scene of incident. Prosecution also tendered documentary evidence on record. Out of 7 witnesses, PW-3 Bhailalbhai Devraj Thakore is examined, who happened to be the neighbour of deceased, and according to the prosecution case, he was the first person to reach near the deceased when she was burning and came out of the house. It is important to note that he has stated that while shouting "save me save me", deceased Kamlaben came out of the house and she was wrapped in a quilt by the witness and ambulance was called and she was shifted to Hospital and appellant - accused No.2 Paruben accompanied deceased along with mother of the deceased. In his cross-examination, he has admitted that at the time of incident, appellant - accused No.2 Paruben was not present and had been to Sabarmati with her husband and she returned from Sabarmati only after the incident was over. While PW-4 Exh. 17 Chunilal Jakshibhai is a witness examined as panch witness of scene of offence, but he has not supported the prosecution case. Out of remaining 5 prosecution witnesses, PW-1 Dr. Deepak Dahyalal Mistry has been examined because he performed postmortem on dead body of Kamlaben and PW-7 Exh. 33 Dr. Belaben Amitkumar Patel is examined because she first got

deceased Kamlaben admitted in the Civil Hospital at Ahmedabad and before whom in the form of history she offered a Dying Declaration, while PW-5 Bharatkumar Shankerdutt Shukla was PI at Madhavpura Police Station, and seeing of Vardhi from Duty Constable of Civil Hospital at Ahmedabad, as recorded in the Station House Register of Madhavpura Police Station, he visited the Hospital and recorded First Information Report of deceased Kamlaben which is produced at Exh. 22. PW-6 Chandrakant Lalluram Vora, a Senior PI of Madhavpura Police Station, who conducted investigation, is also examined. PW-2 Exh. 13 Baldevbhai Rambhai Patel, was Executive Magistrate at the relevant time and received Yadi on 9.2.1994 at 8.30 p.m. for recording of Dying Declaration of Kamlaben and said Yadi is produced at Exh. 14. According to PW-2 Baldevbhai Rambhai Patel, he reached at Civil Hospital at 9.15 p.m., consulted the Doctor on duty who offered the opinion that Kamlaben was in a position to give Dying Declaration and therefore he started recording of Dying Declaration of Kamlaben at 9.20 p.m. and completed it. The said Dying Declaration is on record at Exh. 15.

7. From the evidence tendered by the prosecution and appreciating the same, it clearly appears that the case of the prosecution hinges on three Dying Declarations i.e. first Exh. 34 i.e. in the form of case papers, a declaration offered by the deceased before PW-7 Dr. Belaben Amitkumar Patel, second in the form of FIR as recorded by PW-5 Bharatkumar Shankardutt Shukla, PI and the said FIR is produced at Exh.22, and third a Dying Declaration recorded by PW-2 Exh.13 Baldevbhai Rambhai Patel, Executive Magistrate, and said Dying Declaration is produced at Exh. 15.

8. Learned Advocate for the appellants Mr. Buddhbhatti attacked the judgment and order of conviction on the ground that both the accused are falsely involved by the relatives of the deceased in collaboration with the Police because all the so called Dying Declarations are false and fabricated. It was contended that PW-3 Bhailalbhai Devraj deposed that when Kamlaben came out of the house, nobody was present in her house and appellant - accused No.2 Paruben also came thereafter. It is also contended that PW-1 Dr. Deepak Dahyalal Mistry stated in his deposition that the deceased had 65% burns on her body and might or might not be conscious during 24 hours before her death, nor this witness stated that the injuries received by Kamlaben were sufficient in ordinary course of nature to cause death. It is contended that FIR at Exh. 22 recorded by PW-5 Bharatkumar Shankerdutt

Shukla is fabricated complaint and his evidence is full of contradictions nor the First Information Report contained any endorsement of the Doctor that the deceased was in fit state of mind to offer a Dying Declaration, and no reliance can be placed on such a Dying Declaration. Some important witnesses around the vicinity of the house of the deceased were examined by the Police but their statements were not given to the accused. Some of the witnesses were cited as witnesses in the charge sheet but they were not examined by the prosecution for the ulterior motive. The motive which is assigned for the death of the deceased is exclusively personal affair of husband and wife, and in all probability, it is difficult to believe that the appellant - accused No.2 Paruben would participate in such quarrel and putting deceased to ablaze. Thumb impression of the deceased obtained on FIR at Exh. 22 is also doubtful because PW-2 Baldevbhai Rambhai Patel has specifically stated that he could not obtain the thumb impression of the deceased on the Dying Declaration because bandage was applied on both the hands of the deceased and in these circumstances when none of the Dying Declarations, according to Mr. Buddhbhatti, is believable, the defence of the appellants - accused is probable that none them was present at the time the incident took place and both the appellants are falsely involved in this case.

9. As against that, learned APP Mr. Desai supporting the judgment and order in question, stated that it is not the rule of law that Dying Declarations require corroboration from other evidence. Dying Declaration, according to learned APP, can be sole base for the conviction, if found satisfactory. It is contended that all the three witnesses i.e. PW-2 Baldevbhai RambhaiPatel, Executive Magistrate, PW-5 Bharatkumar Shankerdutt Shukla, PI Exh. 20, who recorded the FIR at Exh. 22 and PW-7 Dr. Belaben Amitkumar Patel, Civil Hospital, who recorded the case history in case papers, which is on record at Exh. 34, are examined and they were extremely truthful and there is no reason to disbelieve them. According to learned APP, all the three Dying Declarations are consistent, trustworthy and can be acted upon and, therefore, the learned Additional Sessions Judge has rightly convicted both the accused for the charges under Section 302 of the IPC.

10. On going through the record, it clearly appears that the evidence of three witnesses i.e. PW-2 Baldevbhai Rambhai Patel, Exh. 13 Executive Magistrate, PW-5 Bharatkumar Shankardutt Shukla, who recorded FIR, PW-7

Dr. Belaben Amitkumar Patel, who prepared case papers of deceased Kamlaben, are required to be appreciated carefully.

11. The incident, as per the prosecution case, took place at 3.00 p.m. on 9th of February, 1994. Thereafter, the deceased Kamlaben with burn injuries was shifted to the Civil Hospital at Ahmedabad where she reached in Ambulance at about 5.40 p.m. PW-7 Dr. Belaben Amitkumar Patel has stated in her deposition at Exh. 33 that on the day of incident, she was on duty as the Chief Medical Officer and at 5.40 p.m. Kamlaben was brought to the Hospital by appellant - accused No.2 Paruben for treatment of burn injuries. Deceased was fully conscious and was in a position to speak properly. On inquiring about the case history, she stated that "my husband and my mother-in-law harassing me much and were beating me. Today at 3.00 p.m. my husband slapped me three times, poured kerosene on me and after igniting match, put me to ablaze." Dr. Belaben further stated that she recorded the case history verbatim in case papers which she produced at Exh. 34. Thereafter the deceased was referred to surgical ward. Witness Dr. Belaben is extensively cross-examined by the defence. She has admitted that handwritings of entering name of the deceased and the address are of Case Writer, to whom she could not remember. She stated that the case history which she has written in the case papers, written by her in her own handwriting. She found that the condition of Kamlaben was serious and she had informed the Duty Constable of the Hospital. Nothing is brought by the defence in cross-examination to disbelieve this witness or to create any doubt as to the history recorded by the witness as stated by the deceased. Noteworthy it is that in this Dying Declaration which is otherwise believable, no role of the appellant - accused No.2 was attributed by the deceased.

12. Second important witness is PW-5 Bharatkumar Shankardutt Shukla, PI, and according to him, on receiving Vardhi from the Hospital by PSO of Madhavpura Police Station, he visited Civil Hospital and recorded the First Information Report of Kamlaben. According to him, deceased was in conscious state and was in a state of giving reply to the questions. According to this witness. As per the say of the deceased, complaint was recorded by his Writer and the right hand thumb impression was obtained on the complaint. The complaint was read over to Kamlaben. In the said complaint which is at Exh. 22, Kamlaben stated that on the day of the incident, appellant - accused No.1 her husband came to

the house for taking lunch. At that time, she complained that why she was harassed by her husband for the whole night everyday and due to this, appellant - accused No.1 was excited and gave three slaps to her. Accused appellant No.1 commanded her to prepare tea but she did not prepare tea for him and she prepared tea for herself alone. Therefore, appellant - accused No.1 brought a tin of kerosene and the same was poured on her. Thereafter, accused - appellant No.2 Paruben, her mother-in-law, set her to ablaze by igniting match stick. The witness Bharatkumar Shukla has been extensively cross-examined but nothing is found to disbelieve the witness. It has been alleged that the deceased was not in a position to give any First Information Report. No timings are mentioned in the complaint and complaint has been recorded on a blank paper. He has admitted that though the deceased was in pain of burn injuries but she was able to speak and was replying properly. There is no reason to disbelieve this witness. Exh. 23 denotes that this complaint was recorded at 7.15 p.m.

13. Third important witness is PW-2 Exh.13 Baldevbhai Rambhai Patel, Executive Magistrate. He has stated that on 9.2.1994 at 8.30 p.m. while he was in V.S. Hospital, he received a Yadi from Madhavpura Police Station at about 8.50 p.m. for recording of Dying Declaration of deceased Kamlaben. The said Yadi which is at Exh. 14 contains opinion of the Doctor of the Hospital to the extent that "patient is conscious. Able to give statement." He reached therefore to Ward E/5 and visited Doctor on duty. On inquiring, the Doctor on duty stated that the deceased was fit to give Dying Declaration. Therefore, he started to record Dying Declaration at 9.20 p.m. He recorded the said Dying Declaration in question - answer form and in the handwriting of his own. According to the witness, there were bandages applied on her hands and, therefore, her right hand thumb impression was not obtained on Dying Declaration. At the time of recording of the Dying Declaration, Kamlaben was in fit state of mind, and at that time, no treatment was being administered to her. In his cross-examination, he denied that PI Bharatkumar Shankerdutt Shukla informed him that he already had recorded the complaint of the deceased. He has been asked about whether before recording of the Dying Declaration, PI Bharatkumar Shankerdutt Shukla or other Police personnel met deceased Kamlaben. The witness stated that neither he knew that Police Inspector had recorded the complaint nor anybody informed him about this. He further stated that when he entered in the ward, relatives of deceased were near the deceased, but all of them were removed from the vicinity of the

deceased. He denied that the Doctor opined as to condition of Kamlaben without examining her. He admitted that due to pain, deceased was giving reply with some difficulty. In cross-examination of this witness also, nothing is brought about by the defence as to discredit his evidence or the Dying Declaration at Exh.15 which he recorded. In Dying Declaration at Exh. 15 deceased stated that on the day of incident, appellant - accused No.1 came to the house for having lunch. At that time, the deceased asked why she was harassed for whole night. For this, she was beaten by husband and thereafter she was directed by Appellant accused No.1 to prepare tea. While she was preparing tea, appellant - accused No.1 brought a tin of kerosene and from that tin, poured kerosene on her and appellant accused No.2 Paruben ignited a match stick which was thrown on her and she was set to ablaze. Shouting she came out and neighbours got together.

14. We have to ascertain the evidentiary value of these three Dying Declarations on record. A Dying Declaration not being a deposition in court neither made on oath nor in the presence of the accused and therefore not tested in cross-examination is yet admissible in evidence on the principle of necessity and can form the base for conviction if it is found reliable, as an exception to the general rule against the admissibility of hearsay. A court of fact is not excluded from acting upon an uncorroborated Dying Declaration for finding conviction because the Dying Declaration is an evidence and being admitted on the premises that ordinarily a dying person will not falsely implicate an innocent person in the commission of serious crime. A Dying Declaration therefore must be considered to be a piece of evidence stands on the same footing as any other piece of evidence. It has to be adjudged and appreciated in the light of surrounding circumstances and it's weight be determined by reference to the principles governing the weighing of the evidence. If the premise that a dying person will not falsely implicate an innocent person in the commission of a crime, is strong enough, and the Dying Declaration does not suffer from any infirmities, like any other evidence, dying declaration even if uncorroborated, becomes weighty evidence against accused of a crime. Each Dying Declaration may form the sole basis for the conviction without the need for independent corroboration if it is shown that the person making it had the opportunity to identifying the person implicated and is thoroughly reliable and free from blemishes. There is no rule of law or even of prudence that such reliable piece of evidence cannot be acted upon unless it

is corroborated, when it is shown that a Dying Declaration is a statement made by the maker in a fit state of mind, and had voluntarily made the statement on the basis of personal knowledge without being influenced by others. Therefore, a Dying Declaration is an independent piece of evidence neither extra strong nor weak and must be appreciated as such.

15. While appreciating the evidence of all the three witnesses i.e. PW-2 Baldevabhai Rambhai Patel, PW-5 Bharatkumar Shankerdutt Shukla and PW-7 Dr. Belaben Amitkumar Patel, it is amply clear that all the three Dying Declarations are free from any infirmities or doubts about the voluntariness or otherwise. All the three witnesses are independent witnesses. There is no reason for the Executive Magistrate or Police Inspector of Mahdavpura Police Station or a Doctor, who received the patient at the first instance, to hatch a conspiracy as to involve accused and record these three Dying Declarations so as to falsely implicate the accused to whom none of them even knows. Soon after the incident, at about 5.40 p.m. while deceased was admitted in Civil Hospital at Ahmedabad, she voluntarily stated as a case history that she was set to ablaze by her husband. Like wise, so far as other two Dying Declarations recorded at Exh. 15 in the form of FIR at 9.20 p.m. and in the form of Dying Declaration by the Executive Magistrate, there is no iota of doubt that she was not in fit state of mind to offer statement. Unblemish depositions of PW-2, PW-5 and PW-7 which could not be shaken by the defence, lend credence to the Dying Declarations to the extent of satisfaction of the court that those Dying Declarations are true, voluntary and genuine. On evidence being scrutinized, it is also found that the declarations cannot be the result of tutoring, prompting or imagination. There is no medical evidence pointed out by the defence on record that the deceased was in that state of unconsciousness that she could never have made such Dying Declarations nor any infirmity is surfacing from the surrounding circumstances established by the evidence to come to the conclusion that the Dying Declarations suffer from any infirmity. At any stage, while recording of Dying Declarations, the opinion of either Executive Magistrate i.e. PW-2 Baldevbhai Rambhai Patel or the opinion of PI, Madhavpura Police Station i.e. PW-5 Bharatkumar Shankardutt Shukla or the opinion of PW-7 Dr. Belaben Amitkumar Patel, differs in respect of the mental state of deceased to negotiate questions put to her and to reply the same to anyone as to the cause of the incident which resulted ultimately in her death. Net result of the appreciation of evidence is that the

evidence of Dying Declarations is unimpeachable and worthy of acting upon it.

16. Very important aspect of the matter while appreciating the evidence must not be overlooked. Though there are three Dying Declarations recorded by prosecution witnesses PW.2, PW-5 and PW-7 and are found genuine, it is noteworthy that the first point in time, Dying Declaration is recorded by PW-7 Dr. Belaben Amitkumar Patel, in the shape of case history in her case papers at Exh. 34 wherein deceased Kamlaben implicates only accused - appellant No.1 her husband to have poured kerosene and set her to ablaze, while no role is assigned to appellant - accused No.2. In remaining two Dying Declarations which are at Exh. 15 and 22 further role in addition to appellant - accused No.1, is assigned to appellant - accused No.2, mother-in-law of the deceased Paruben to the extent that kerosene was poured by accused - appellant No.1 and match stick was ignited and thrown upon the deceased by appellant - accused No.2. The Dying Declaration recorded at Exh. 34 by Dr.Belaben in the form of case history on case papers is found genuine, true and believable. We do not say that other two Dying Declarations recorded subsequent are not trustworthy. On appreciation, other two Dying Declarations of the deceased are also found genuine but the fact remains that no role is attributed by the deceased to appellant accused No.2 in very first Dying Declaration which is first in point of time before Dr. Belaben Amitkumar Patel. Though all the three Dying Declarations are found genuine but since no role is assigned to appellant accused No.2 in first Dying Declaration of the deceased before Dr. Belaben Amitkumar Patel, PW-7, appellant accused No.2 is entitled to benefit of doubt because attribution of role to appellant - accused No.2 Paruben may be an after thought of deceased which is apparent from the Dying Declaration at Exh. 15 as recorded by the Executive Magistrate wherein the deceased stated that she was not on speaking terms with her mother-in-law appellant - accused No.2. In these circumstances, though all the three Dying Declarations are found genuine, though in subsequent two Dying Declarations, role is attributed to appellant accused No.2 as improvement and addition by the deceased, this fact cannot be a ground to discard the first Dying Declaration which is recorded in the form of case history by PW-7 Dr. Belaben Amitkumar Patel. In similar circumstances in the matter of SREERAMA MURTHY vs. STATE OF A.P., reported in AIR 1998 SC 3040 in paras 5 and 6, the Apex Court observed as under :

"5. What is contended by the learned counsel for the appellant is that the dying declarations Ex. P. 23 and Ex. P.33 ought not to have been relied upon as they contain improvements. He further pointed out that in the last dying declaration a clear attempt was made to involve the father of the appellant who has now been acquitted by the High Court. Because of some doubt arising therefrom the appellant's father was given benefit of doubt. That does not necessarily mean that it was not genuine. In any case, it does not have any bearing upon the genuineness and truthfulness of the first dying declaration Ex.P.26, which was recorded by the Additional First Class Judicial Magistrate after ascertaining the physical and mental fitness of the person making it. In that declaration she has clearly stated that she was set on fire by her husband.

6. We see no reason to discard that dying declaration. In that view of the matter, the conviction of the appellant has to be confirmed. These appeals are, therefore, dismissed."

17. From the above discussion, we come to the conclusion that when role is attributed to appellant accused No.1, in all the three Dying Declarations, and those Dying Declarations are genuine and creditworthy, appeal filed by appellant - accused No.1 has no merit, while accused - appellant No.2 is entitled to the benefit of doubt because her role is attributed by the deceased in subsequent two Dying Declarations, which we could not find in very first version of the deceased before PW-7 Dr. Belaben Amitkumar Patel. Therefore, we could not accept the arguments of learned Advocate for the appellants that the Dying Declarations are concoction and that the same was the result of tutoring by and the influence of the relatives of the deceased. The evidence discloses that the FIR at Exh. 22 was recorded by PW-5 Bharatkumar Shankerdutt Shukla, PI at 7.15 p.m. where when the deceased was still being treated and no bandage was applied to the hands of the deceased and, therefore, the right hand thumb impression was obtained by PW-5 on complaint at Exh. 22. While Dying Declaration Exh. 15 came to be recorded by PW-2 Baldevbhai Rambhai Patel, Executive Magistrate at 9.20 p.m. and deceased by then might have received full treatment and bandages over the hands and therefore the Executive Magistrate has rightly noted that he could not obtain right hand thumb impression of the deceased. Therefore, this fact would

not dislodge any of the Dying Declarations as contended by the learned Advocate for the appellants.

18. Now, in situation as aforesaid, when we have found all the three dying declarations of the deceased truthful and worthy to be acted upon and at the same time, when the role of appellant - accused No.2 is subsequently attributed by the deceased in two subsequent dying declarations, the liability of the crime having been committed will have to be attached as per the role attributed by the deceased to each of the appellants accused and appreciation of evidence in this regard. At this juncture, it is also necessary to discuss the defence advanced by each of the appellants - accused about alibi. So far as the appellant - accused No.1 is concerned, vide Exh.40 as defence witness, he has examined Yogesh Niranjan. At Exh.42, as defence witness No.2, he has examined Mahesh Damodar. Defence witness No.1 is a Manager of a firm dealing in medicines and it is a defence of the appellant- accused No.1 that at the time of incident, he delivered cartoons of medicines on a hand-cart to Gopi Distributors, situated at Shriji House, Opposite Mithakhali Crossing, on Ashram Road. This witness is not helpful to appellant - accused No.1, because nowhere he even stated that such cartoons were delivered by appellant - accused No.1 to this witness. Likewise, defence witness no. 2 - Mahesh Damodar, was working as a Clerk in Lalji Mulji Transport Company, office of which was situated near Prem Darwaja, at Ahmedabad. He said that on 9.2.1994 some goods were sent on hand-cart by his Transport Company to Gopi Agency and C.M. Agency through labourers Ramuben and Manuji (Appellant - accused No.1), but having regard to the cross-examination of this witness by learned. APP, it is clear that this defence witness No.2 is also not helpful to appellant - accused No.1 because receipts which this witness produced at Exh. 41, does not contain at what time such cartoons were sent through appellant-accused No.1. Therefore, the learned Trial Judge rightly disbelieved the defence offered by appellant- accused No.1 in respect of his alibi. Now, so far as the appellant-accused No.2 is concerned, appreciating the fact that a role in the crime is attributed by the deceased to appellant - accused No.2 in subsequent two dying declarations, the defence advanced by her is also required to be appreciated at this juncture. Appellant accused No.2 has examined defence witness No. 3 - Somaji Mohanji Thakor, at Exh. 43, who stated that his elder brother Mangalji Mohanji died on 8.2.1994 in Civil Hospital. Appellant-accused No. 2, according to this witness, was related to them. On 9.2.1994, cremation and

after death rituals were performed after 11.00 a.m. on the same day. Appellant-accused No. 2 and her husband reached to their house at about 10.00 a.m. The cremation was performed at Vadaj Cremation Ground at about 12.30 to 13.00 hours. All the male members attended the cremation at Vadaj, while all the female members remained at the residence as per the custom. He has produced a certificate of Vadaj Smashan Gruh vide Exh.44, denoting that cremation of deceased Mangalji Mohanji was performed at that place. Now, when we consider cumulative effect of this evidence, it is clear that defence of appellant accused No.2 appears to be more probable that at the time of incident, she might not be present at the scene of offence. This fact has been confirmed by one more witness i.e. prosecution witness No. 3 - Bhailal Devraj Thakore in his cross-examination, when he stated that on the day of incident, appellant - accused No.2 along with her husband, had been to Sabarmati. The role of appellant-accused No.2 in the crime, therefore, has become doubtful. In the matter of Dhanraj and others vs. State of Maharashtra, as reported in (2002) 7 SCC p. 425, the Apex Court in para-13, observed as under:

> "13. Learned counsel for the appellant has, however, submitted that the name of Venubhai is not mentioned in the dying declaration recorded by the Magistrate. In her dying declaration while mentioning about the incident said to have taken place on 12.3.1992 Sindhubai has stated about her mother-in-law (Venubai) along with others having beaten and poured kerosene on her but in regard to the incident in question which took place on 17.3.1992, the role of pouring the kerosene is assigned only to Laxmi and there is no mention of the name of Venubai nor any role is assigned to her. In our view this entitles Venubai to benefit of doubt."

19. In the above view of the matter as per the role attributed to each of the accused in three Dying Declarations and considering other evidence on record including defense evidence, though we find all the three Dying Declarations to be genuine, as discussed above, appeal of appellant No.1 is required to be rejected and the appeal filed by appellant accused No.2 is required to be accepted and allowed.

20. In the result, Appeal qua accused - appellant No.1 Manuji Maganji Thakore stands dismissed, while Appeal qua accused appellant No.2 Paruben, wife of Maganji Gemaji Thakore is allowed. The judgment and

order impugned in this Appeal, to the extent of convicting accused - appellant No.2 Paruben, wife of Maganji Gemaji Thakore, under Section 302 read with Section 34 IPC and sentencing her for the life imprisonment is quashed and set aside. Accused appellant No.2 Paruben, wife of Maganji Gemaji Thakore is acquitted of the charges under Section 302 read with Section 34 of IPC levelled against her. Accused appellant No.2 Paruben, wife of Maganji Gemaji Thakore is on bail vide order dated 13.11.1995 of the Division Bench of this Court and hence her bail bond stands cancelled.

(B.J. Shethna, J.)

(J.R. Vora, J.)

p.n.nair